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OFFICE OF PETITIONS

In re Application of
Sivik, et al
Application No. 09/699,522
Filing Date: 30 October, 2000
Attorney Docket No. 7576R/APV31122

This is a decision on the petition filed on 19 August, 2004, to revive the instant application under 37 C.F.R. §1.137(b) as having been abandoned due to unintentional delay.

For the reasons set forth below, the petition under 37 C.F.R. §1.137(b) is **GRANTED**.

BACKGROUND

The record reflects that:

- Petitioner failed to reply timely and properly to a non-final Office action mailed on 3 December, 2003, with reply due absent extension of time on or before 3 March, 2004;
- the application went abandoned after midnight 3 March, 2004;
- the Office mailed the Notice of Abandonment on 6 July, 2004;
- contemporaneously with the filing of the petition (with fee), Petitioner has filed a Continuation Application, which has been assigned Application No. 10/921,324, as the required reply, and made the statement of unintentional delay.

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).¹

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.²

Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴ And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶)

This showing should include, but is not limited to, docket records, tickler reports, and file jacket entries for this application, and documents regarding the alleged cause of the delay and copies of any documents referred to in Petitioner's statements as to the cause of the delay are required. All the causes which contributed to the abandonment must be presented and supported with

¹ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

³ See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 *Off. Gaz. Pat. Office* at 86-87 (October 21, 1997).

⁴ See: In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 *Off. Gaz. Pat. Office* 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 *Off. Gaz. Pat. Office* supra.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

appropriate evidence.⁷

Allegations as to Unintentional Delay

A grantable petition under 37 C.F.R. §1.137(b) requires a petition, fee, reply and statement/showing of unintentional delay, reply (and a terminal disclaimer and fee if appropriate).

As indicated above, Petitioner has satisfied the regulatory requirements.

CONCLUSION

The petition under 37 C.F.R. §1.137(b) is **granted**.

The instant application is revived for the purpose of continuity.

The instant file (IFW) is released to Technology Center 1700 for such processing as necessary in connection with this decision.

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.



John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁷ The showing must also enumerate the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly. The showing can be verified by using the attached petition form which includes a declaration according to 37 C.F.R. §1.68. Statements from all persons who contributed to the delay are also required.

APV 31122A
The Patent and Trademark Office Official File
Date Stamp Hereon is Acknowledgment of Filing:

New US Continuation Application with Transmittal; 121 pages of Spec.; Abstract; 3 Declarations; Post Card; IDS w/ 1449 (8 pages); Power of Attorney and Change of Correspondence Address (2); Preliminary Amendment; Notice of Claim for Priority; Application Data Sheet; Check No. 40653 for \$856.00

In re the Application of: DOCKETED

APPLICANT: Sivik et al. *BN on 08/25/2004*

SERIAL NO.: To be assigned
(Continuation of USSN 09/699,522)

DOCKET NO.: APV31122A

SENDER'S INITIALS: APV/kag

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